IN THE SUPREME COURT OF IOWA

NO. 17-0468

IOWA DEPARTMENT OF ECONOMIC DEVELOPMENT,

Appellant,

vs.

GHOST PLAYER, LLC, and
CH INVESTORS, LLC,

Appellees.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
HONORABLE MICHAEL D. HUPPERT, JUDGE

APPELLANT IOWA DEPARTMENT OF ECONOMIC DEVELOPMENT'S FINAL BRIEF

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ROUTING STATEMENT

Appellant urges that this case should be routed to the Supreme Court because it involves certain substantial questions of enunciating or changing legal principles concerning the applicability of res judicata to agency tax credit determinations, which is of broad public importance because it concerns the responsible use of taxpayer funds. *See* Iowa R. App. P. 6.1101(2)(d)&(f).

STATEMENT OF THE CASE

The questions before this court are whether an agency tax credit decision is a final adjudicatory decision and, if so, whether that precludes an agency from clawing back credits based on subsequently discovered false and apparently fraudulent misrepresentations made by the party applying for tax credits.

Subsequent to awarding tax credits to Appellee Ghost Player, LLC[1], Appellant Iowa Economic Development Authority ("IEDA"), f/k/a Iowa

[1] For convenience, Appellee Ghost Player, LLC, and Appellee, CH Investors, LLC, which is involved as an investor in Ghost Player, LLC and a third party beneficiary of the contract between Ghost Player, LLC and the State of Iowa, shall be referred to collectively herein as "Ghost Player."

Department of Economic Development ("IDED")[2] learned that Ghost Player had completely fabricated several alleged "like-exchange" or "in-kind" agreements to inflate its claimed expenses by at least $250,000 for purposes of claiming tax credits from the State of Iowa. Upon discovery of Ghost Player's fabrications, and after providing notice and an opportunity to cure, the Agency declared Ghost Player in default under the contract between the parties for providing untrue or misleading statements and cancelled previously-issued tax credits.

The court below held that the State could not cancel previously-issued tax credits because the original tax credit determination constituted a final adjudicatory decision that cannot be revisited on the basis of any information that could have possibly been discovered when the credits were initially issued. Because the court concluded that it was theoretically possible for the Agency to have discovered Ghost Player's fabrications while reviewing the initial credit application, it is now precluded from raising the issue. The Agency respectfully disagrees, and urges that this Court reverse the decision below.

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[2] The caption refers to appellant as Iowa Department of Economic Development because that was the agency's name at the time of the initial tax credit determination and when the dispute between the parties arose. The agency was subsequently re-named Iowa Economic Development Authority. To avoid confusion, IEDA / IDED shall be referred to herein as the "Agency."

STATEMENT OF THE FACTS AND PROCEDURAL BACKGROUND

a. Facts.

In October of 2009 and in accordance with the Contract between the IDED and Ghost Player, 08-FILM-030 (the "Contract"), the Agency requested a status report for *Field of Dreams Ghost Players*. (Agency Record. ("R") at 481-482, App. 139-140). On December 10, 2009, Ghost Player submitted a status report and a budget summary for the film production to the Agency. (R. at 487-506, App. 141-160). Ghost Player's status report and budget summary listed a total of $625,000 in alleged "in-kind promotions." (R. at 490, App. 144). Louisville Slugger Museum & Factory ("Louisville Slugger"), Ringor, and the Cedar Rapids Kernels ("the Kernels") were not included in this original list of "in-kind promotions."

In May of 2010, Ghost Player submitted its Form Z claim for tax credits and supporting documentation. (R. at 692-741, App. 163-212). This Form Z increased the claimed in-kind promotions from the $625,000 listed on the December 2009 status update to $900,000. (R. at 734, App. 205). Ghost Player claimed, among other things, a new $200,000 in-kind agreement with Louisville Slugger, a new $25,000 in-kind agreement with Ringor, and a new $25,000 in kind agreement with the Kernels. (R. at 734, App. 205). Ghost Player submitted unsigned and undated documents that

purported to be "like-exchange of services" agreements with those three companies in connection with the film *Field of Dreams Ghost Players*.[3] (R. at 1036-37; 1042-45, App. 581-582; 587-590).

The Form Z contained the following certification:

> **I hereby certify that all representations, warranties, or statements made or furnished to IDED in connection with these expenses are true and correct in all material respects.** I understand that it is a criminal violation under Iowa law to engage in deception and knowingly make, or cause to be made, directly or indirectly, a false statement in writing for the purpose of procuring economic development assistance from a state agency or subdivision. (emphasis added).

(R. at 722, App. 267).

After the Agency disallowed *all* in-kind sponsorships as a matter of law, consistent with the December 2009 FAQs for the Iowa Film Program, Ghost Player objected to this categorical disallowance of all in-kind claims and attempted to justify its claimed in-kind sponsorship agreements. (R. at 1304-1308, App. 846-850). On January 18, 2011, Ghost Player purported to verify that the documents it submitted to IDED were **"[c]opies of in-kind agreements.**" (R. at 1306, App. 848) (emphasis added). Ghost Player further stated that each of the in-kind **"investments is documented,"** and that, under these arrangements Ghost Player received **"goods and services**

[3] The terms "in-kind," "like kind" and "like-exchange" appear to be used interchangeably to refer to the same agreements.

such as sponsorships, advertising and promotion." (R. at 1306, App. 848) (Emphasis added). Ghost Player's objection to the Agency's preliminary tax credit determination also listed and reiterated its claim of $900,000 in like-kind sponsorships, including those supposedly with Louisville Slugger, Ringor, and the Kernels. (R. at 1308, App. 850).

Following Petitioners filing of a previous petition for judicial review, CVCV 50209, seeking to overturn Respondent's determination that in-kind agreements were not qualified expenditures eligible for tax credits, the Agency investigated the veracity of Ghost Player's in-kind claims. The Agency had no reason to make such investigation prior to Ghost Player's petition since the veracity of the specific in-kind agreements was irrelevant if all in-kind claims were disallowed as a matter of law. Upon investigating Ghost Player's claimed in-kind agreements for the first time, the Agency learned that two of the vendors Ghost Player supposedly had agreements with—Louisville Slugger and Ringor—expressly deny having any in-kind agreement with Ghost Player or its production company, DreamCatcher Productions, LLC ("DreamCatcher").[4] (R. at 1399-1404; 1519-1522; 1528-1536, App. 888-893, 959-962, 964-972). A third vendor—the Kernels—has no record of any agreement or any exchange of services. (R. at 1527, App.

[4] The purported like-kind agreements submitted by Ghost Player are between DreamCatcher and the various entities.

963). A more specific discussion of the facts concerning each of these three vendors follows.

Louisville Slugger

During the tax credit determination process, Ghost Player claimed it had a written, like-exchange agreement with Louisville Slugger pursuant to which services valued at $200,000 were exchanged, i.e. Louisville Slugger purportedly agreed to provide promotion, advertising, and marketing services to Ghost Player in exchange for a like value of promotion, advertising and marketing services provided by Ghost Player to Louisville Slugger. (R. at 734; 1042-43, App. 279). Ghost Player submitted to the Agency an unsigned document purporting to be a copy of that agreement. (R. at 1042-43, App. 587-588).

Anne Jewell, Vice President and Executive Director of Louisville Slugger, provided the Agency with an affidavit stating that Louisville Slugger did not have a like-exchange of services agreement regarding *Ghost Player*. (R. at 1532, App. 968). Louisville Slugger did not receive or provide the services listed in the purported like-exchange agreement submitted by Ghost Player, nor did Louisville Slugger agree to the $200,000 figure contained therein. (R. at 1532, App. 968). Rick Redman, Vice

President of Corporate Communications for Louisville Slugger, provided an affidavit to the same effect. (R. at 1536, App. 972).

Louisville Slugger also provided e-mails that show written communications between it and Joe Scherrman, director of the Ghost Players documentary and principal of Ghost Player and DreamCatcher. (R. at 1533-35, App. 969-971). On August 11, 2009, Scherrman asked Jewell and Redman via email whether Louisville Slugger would like to be an in-kind sponsor of the DVD and companion book. (R. at 1533-34, App. 969-970). Scherrman offered to list Louisville Slugger in the credits of the movie and the book "as an act of good faith." (R. at 1533, App. 969). Ms. Jewell responded by stating, in part, **"I can't proceed as you've described."** (Emphasis added). (R. at 1533, App. 969).

The Agency provided Ghost Player with copies of the above-referenced affidavits and emails as enclosures to a March 1, 2016 letter. (R. 1399-1404, App. 888-893). Ghost Player had the opportunity to provide additional evidence in support of its claim and declined to do so. Ghost Player offered no explanation or additional evidence to cast doubt on the accuracy or authenticity of the Louisville Slugger affidavits, the veracity of the affiants, or otherwise supporting the existence of an agreement with Louisville Slugger. Based on the foregoing, the Director of the Agency (the

"Director") found that Ghost Player willfully and knowingly submitted a falsely inflated claim for tax credits based on a purported agreement with Louisville Slugger that never actually existed. (Final Agency Decision dated May 26, 2016 (the "Agency Decision"), at 7-9; 17-18, App. 107-109; 117-119).

Ringor

During the tax credit determination process, Ghost Player claimed it had a written, like-kind exchange agreement with Ringor pursuant to which services valued at $25,000 were exchanged, i.e. reciprocal advertising and promotion similar to the purported arrangement with Louisville Slugger. (R. at 734; 1036-37, App. 279, 581-582). Ghost Player submitted to the Agency an unsigned document purporting to be a copy of that agreement. (R. at 1036-37, App. 581-582).

James T. Dunn, a Portland, Oregon attorney who, for over 20 years, has represented the company that owns the Ringor trade name, provided background on the alleged like-exchange agreement submitted to the Agency by Ghost Player. (R. at 1521-22, App. 961-962). Specifically, Mr. Dunn stated in a letter to the Agency that Ringor did not enter a like-exchange of services agreement for Field of Dreams Ghost Players, that Ringor did not agree to exchange $25,000 of services for the film, that it has

no record of providing or receiving any services, and that Ringor would have assigned *no* value to the proposal. (R. at 1521-22, App. 961-962). Mr. Dunn also noted that Ringor abandoned its baseball product line in 2008, and that it therefore would have had no reason to sponsor a movie about baseball. (R. at 1522, App. 962). The 2-page "Like-Exchange of Services" document that Ghost Player submitted to the Agency in support of its tax credit claim was "completely new to Ringor." (R. at 1521, App. 961).

Subsequent to being provided with Mr. Dunn's letter as an enclosure to the March 1, 2016 letter from the Agency, (R. at 1399-1404, App. 888-893), Ghost Player offered no explanation or additional evidence to cast doubt on the accuracy or authenticity of the Dunn letter, or otherwise supporting the existence of an agreement with Ringor. Based on the foregoing, the Director found that Ghost Player willfully and knowingly submitted a falsely inflated claim for tax credits based on a purported agreement with Ringor that never actually existed. (Agency Decision, at 9-10; 17-18, App. 109-110; 117-118).

Cedar Rapids Kernels

During the tax credit determination process, Ghost Player claimed it had a written, like-exchange agreement with the Cedar Rapids Kernels pursuant to which services valued at $25,000 were exchanged, i.e. reciprocal

advertising and promotion similar to the purported arrangement with Louisville Slugger. (R. at 734; 1044-45, App. 279). Ghost Player submitted to the Agency an unsigned document purporting to be a copy of that agreement. (R. at 1044-45, App. 589-590).

Doug Nelson, CEO of the Cedar Rapids Baseball Club, submitted a letter to the Agency in which he stated that the Kernels have no record of any agreement with DreamCatcher or of any services exchanged with DreamCatcher and no current or former staff member recalls entering into any written or verbal agreement with Ghost Player. (R. at 1527, App. 963). He further stated that, when the Kernels do enter into such agreements, it is the Kernels' practice to call such agreements "Trade Agreements", not "Like-Exchange of Services Agreements." (R. at 1527, App. 963). Additionally, Mr. Nelson denied that the Kernels provided $25,000 in services to DreamCatcher, noting that there is no record of providing any services. (R. at 1527, App. 963). Furthermore, he made it clear that, even if the services listed by Ghost Player in the supposed Like-Exchange of Services Agreement had been provided, the value of such services was substantially inflated in that the approximate value of such services would be $5,000, not $25,000. (R. at 1527, App. 963). Finally, the Kernels have no

record of DreamCatcher providing the organization with any benefits. (R. at 1527, App. 963).

Subsequent to being provided with Mr. Nelson's letter as an enclosure to the March 1, 2016 letter from the Agency, (R. at 1399-1404, App. 888-893), Ghost Player offered no explanation or additional evidence to cast doubt on the accuracy or authenticity of the Nelson letter or Mr. Nelson's veracity, or otherwise supporting the existence of an agreement with the Kernels. Based on the foregoing, the Director found that Ghost Player willfully and knowingly submitted a falsely inflated claim for tax credits based on a purported agreement with the Kernels that never actually existed. (Agency Decision, at 11-12; 17-18, App. 111-112; 117-118).

b. Procedural Background

On January 12, 2016, promptly after learning that the above-referenced vendors denied having in kind agreements with Ghost Player / DreamCatcher, the Agency issued to Ghost Player a Notice of Default under Section 10.2 of the Contract informing Ghost Player of these facts and providing opportunity to cure by proof that such agreements were valid. (First Notice of Default, App. 74-75). On January 20, 2016, the Agency issued to Ghost Player a Second Notice of Default and opportunity to cure citing certain additional defaults under the same Contract. (Second Notice

of Default, App. 76-77).[5] In response to these notices, Ghost Player submitted a letter to the Agency dated February 19, 2016, disputing the assertions contained in the notices of default and requesting "a hearing before an impartial tribunal, including a mechanism to conduct discovery prior to the hearing and to present evidence regarding the challenges to Ghost Player's performance under the contract which IEDA has raised in its Notices of Default" and to be informed of the procedures that would apply to such hearing. (Letter from Petitioner's: Counsel dated 02-09-16, App. 78-85). On March 1, 2016, the Agency notified Ghost Player by letter that its request for a hearing had been granted and that the matter would be transmitted to the Iowa Department of Inspections and Appeals ("DIA") for a contested case hearing under the procedures set forth in the Iowa Administrative Procedure Act, Iowa Code §17A, and the DIA's contested case rules, Iowa Admin. Code § 701-10.4(1). (R. at 1399-1404, App. 888-893). This same letter included the attachments referenced herein in which representatives of Louisville Slugger, Ringor, and the Kernels denied the existence of the agreements.

[5] This was based on payments between several related entities that appeared to be either fabricated or inflated. However, in the Agency Decision the Director concluded there was inconclusive evidence on that issue and based her decision entirely on the fraudulent misrepresentations.

On March 22, 2016, the Agency submitted a transmittal form to the DIA for assignment to an administrative law judge. (R. at 1393-1394, App. 883-884). That transmittal noted that "IEDA anticipates the parties will want to engage in discovery prior to a contested case hearing in this matter." (R. at 1393, App. 883). The matter was assigned to ALJ John M. Priester and an Order Setting Pre-Hearing Conference was issued on March 25, 2016 setting a scheduling conference for April 14, 2016. (R. at 1390, App. 880). On April 12, 2016, Ghost Player filed a "motion to dismiss", which the Director interpreted as a withdrawal of Ghost Player's previous request for a contested case hearing. (R., at 1382-1387, App. 872-877). The Agency did not oppose the motion and filed a withdrawal of reference. (R. at 1378, App. 868). On April 14, 2016 DIA issued an Order Canceling Appeal whereby the matter was withdrawn from the DIA and returned to the IEDA for final agency action. (R. at 1377, App. 867).

On April 14, 2016, the Agency sent a letter to Ghost Player indicating that, in light of Ghost Player's declination of the opportunity to participate in a contested case proceeding, the Agency intended to issue a final agency decision based on the evidence in its possession. (Letter from Rita Grimm dated 4-14-16, App. 98). Ghost Player was again invited to submit additional documentation or other evidence to IEDA in support of its claims.

(Letter from Rita Grimm dated 4-14-16, App. 98). Ghost Player responded by letter dated April 21, 2016 in which it disputed the Agency's authority to issue a final agency decision on preclusion grounds. (Letter from Petitioner's Counsel dated 4-21-16, App. 99). Ghost Player did not refute the testimony from representatives of Louisville Slugger, Ringor and the Kernels denying the existence of agreements for which Ghost Player was claiming $250,000 in expenditures. (Letter from Petitioner's Counsel dated 4-21-16, App. 99). Indeed, Ghost Player offered no evidence whatsoever in support of its claimed expenditures. (Letter from Petitioner's Counsel dated 4-21-16, App. 99).

IEDA issued a final agency decision May 26, 2016. (Agency Decision, App. 101-120). The Director of IEDA found that Ghost Player had submitted a number of false expense claims supported by apparently fabricated documents, which constituted a default under the contract between the Agency and Ghost Player. (Agency Decision, at 4-12, 20, App. 104-112, 120). Accordingly, and in accordance with the contractual remedies provision, the Director revoked tax credit certificates previously issued to Ghost Player, notified the Iowa Department of Revenue not to honor such tax credit certificates, and directed that no additional tax credits

be issued to Ghost Player or affiliated entities and individuals. (Agency Decision, at 4-12, 20, App. 104-112, 120).

Ghost Player petitioned for judicial review on June 28, 2016 and the district court reversed the agency's decision on preclusion grounds in a decision dated February 20, 2017 (the "Ruling"). (App. 981-991). This appeal timely followed.

SUMMARY OF THE ARGUMENT

Since there is no reasonable dispute that Ghost Player fabricated documents in an apparent effort to cheat Iowa taxpayers by inflating its tax credit claim by at least $250,000, and there is also no dispute that the Agency has authority to determine Ghost Player's eligibility for and amount of tax credits, the only fighting dispute is whether some species of preclusion prevents the state from revoking previously issued tax credits.

It should not. First an agency decision in a non-adversarial tax credit determination process, subject to appeal and judicial review, is not a final adjudicatory decision in which it is fair to presume the parties have had a full and fair opportunity to raise all claims, defenses and other issues. Even if it were, it is clear from the record that the facts and consequences of Ghost Player's fabrication of like kind agreements was an entirely new issue not raised, litigated, necessary or even material to the original tax credit

determination. It was not even material to the original decision because like kind agreements were disallowed as a matter of law. It was only after **Ghost Player made that issue material** by seeking a court order declaring like kind agreements as qualified expenditures eligible for tax credits that IEDA had any reason to suspect it may be necessary to verify the legitimacy and amounts of such claims.

Under these circumstances, neither issue nor claim preclusion nor any similar rule against collateral attacks should prevent IEDA from exercising its contractual right to issue a notice of default based on newly discovered breaches of contract, and exercise its remedies under the Contract between the parties. The IEDA as guardians of the public fisc have not only the right, but the duty to determine that taxpayer funds distributed to private parties are for a legitimate public purpose. They exercised that duty in a rational and timely manner, and their decision should be upheld.

ARGUMENT

I. Res Judicata does not Foreclose the Agency's Exercise of its Clear Authority to Revoke Tax Credits Issued to a Party Upon Discovering that Party Made False Representations in its Tax Credit Application.

Error Preservation: IEDA preserved error on this issue by arguing that neither issue nor claim preclusion applies for various reasons, including inter alia that "[t]here is no final adjudicatory decision with respect to the

previous action," and that "for issue preclusion or res judicata to apply, the issue litigated must be identical to the issue raised in the previous action." (Respondent's Brief in Opposition to Judicial review, at 14-15, App. 134-135) (citing *Polk County Secondary Roads v. Iowa Civil Rights Comm'n*, 468 N.W.2d 811, 817 (Iowa 1991). The district court ruled on this issue. (Ruling, at 6-10, App. 986-990).

Standard of Review: On further review of a district court's decision reviewing an agency decision, the Supreme Court will apply the standards of the statute governing judicial review of agency decision making to determine whether the Supreme Court reaches the same result as the District Court. *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 255-256 (Iowa 2012). The statute governing judicial review is Iowa Code § 17A.19(10), which provides the court will "reverse, modify, or grant other appropriate relief from agency action," if it determines the "substantial rights of the person seeking judicial review have been prejudiced because" the agency action falls within one of the categories specified therein. In this case, Ghost Player alleged the Agency's action was:

> (b) Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law; or
>
> (d) Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process.

Iowa Code Chapter 17A.19(10)(b & d). Petitioners appear to also be asserting that the agency is incorrectly interpreting the principles of claim and/or issue preclusion or some analogous legal principle, which would fall under:

> (c) Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.

Iowa Code § 17A.19(10)(c). The "burden of demonstrating the required prejudice and the invalidity of an agency action is on the party asserting invalidity." Iowa Code § 17A.19(8).

Argument: Although there are nominally three different provisions of Iowa Code § 17A at issue here, they all amount to asking the following question:

> 1) Is it an erroneous interpretation of law to conclude that res judicata based on a prior tax credit determination does not prevent the Agency from declaring newly discovered events of default under Contract?

For all the reasons herein, the answer should be "no."

A. Unless Res Judicata Applies, IEDA Clearly Has the Authority to Revoke Tax Credits Based on Ghost Player's Breaches of Contract.

The Petitioners concede, as they must, that the "IDED undoubtedly had the authority to determine whether Petitioners were

eligible for tax credits and the appropriate amount of tax credits to award the petitioners – based on Iowa Code Chapter 15.393, Iowa Administrative Code 261-36, and the contract between Petitioners and IDED." (Petitioners Reply Brief, at 4, App. 976). Iowa Code, IEDA's rules, and Contract 08-FILM-030 clearly establish that IEDA has authority to revoke tax credit certificates, notify the Department of Revenue not to honor such certificates, and refuse to issue additional tax credits to a party that has submitted false documents or other information in support of an application for film tax credits.

The film credit statute required the agency to "provide for the registration of projects to be shot on location in the state." Iowa Code § 15.393(1).[6] "A project that is registered under the [Film Program]" was eligible to claim tax credits and adjusted gross income reduction provided by the statute. Iowa Code § 15.393(2). In order to be eligible, the project was required to meet certain criteria relating to legitimacy of the project, amount of expenditures, economic impact, and other criteria established by rule, all of which necessarily required

[6] The film, television, and video project promotion program has been repealed. The code references refer to the version of the statutes and rules in effect prior to revocation and applicable to the Appellees' application for benefits. Copies of the pre-repeal version of the relevant code are provided in the agency record, R. at 1367-1376, App. 856-865).

the agency to interpret the film credit statute and apply it to the facts, i.e. the information provided by applicants. *See* Iowa Code § 15.393(1)(a-d).

IDED adopted administrative rules that set out the process to apply for registration under the Film Program. Iowa Admin. Code r. 261-36.3 & 261-36.4 (Oct. 8, 2008). IDED's administrative rules also stated that IDED would require terms and conditions in exchange for approval and registration in the Film Program. Iowa Admin. Code r. 261-36.3—36.5 (Oct. 8, 2008). Specifically, IDED's rules stated that "[t]o be eligible to receive tax credits under [the Film Program], a request for registration shall be submitted to IDED." Iowa Admin. Code r. 261-36.3 (Oct. 8, 2008). The administrative rules required IDED to notify "[s]uccessful applicants…of approval of a request for registration, including any conditions and terms of approval." Iowa Admin. Code r. 261-36.5(1) (Oct. 8, 2008). IDED's rules required the agency to prepare a contract for successful applicants that included the "terms and conditions for receipt of the tax credit benefits." Iowa Admin. Code r. 261-36.5(2) (Oct. 8, 2008).

Ghost Player and the IDED did in fact agree to the terms of the Contract, as required by rule. The Contract sets forth events of default

(Contract, Section 10.1, App. 47-48). These include "[a]ny representation or warranty made by the Recipient in this Contract or in any statement or certificate furnished by it pursuant to this Contract, or made in its Application, or in connection with any of the above, *proves untrue in any material respect* as of the date of the issuance or making thereof." (Contract, 10.1(c), App. 48) (emphasis added). This implicates certain additional contractual representations, including "[t]he Application furnished to the IDED by Recipient **does not contain any untrue or misleading statements of a material fact** nor does it omit a material fact," (8.4), that "[n]o Default or Event of Default has occurred or is continuing," (8.10) and that "[t]he Recipient is in compliance with the requirements of all federal, state and local laws, rules and regulations . . ."[7] (8.11). (App. 45-46) (emphasis added).

The Contract further provides that IEDA must give notice of default if it has reason to believe the Recipient is in default and provide at least 30 days opportunity to cure. (Contract, 10.2, App. 48). "If the Default remains uncured, the Recipient is required to

[7] In addition to being a breach of contract, it is also a crime to submit "a false statement in writing, for the purpose of procuring economic development assistance from a state agency or political subdivision . . ." Iowa Code § 15A.3.

repay all or a portion of the tax credit benefits received. The Iowa Department of Revenue will be notified of any uncured default. IDED or the Department of Revenue may take action to collect the amount owed. The amount to be repaid may include the value of the tax credit benefits claimed under the Program and applicable interest and penalties as may be established by the Iowa Department of Revenue." (Contract, 10.3, App. 48). Additionally, IEDA has the right to seek "all expenses reasonably incurred or paid by IDED including reasonable attorneys' fees and court costs, in connection with any Default or Event of Default . . ." (Contract, 10.4, App. 48).

Based on the applicable statute, IEDA's administrative code, and the Contract adopted pursuant to that code, IEDA clearly had authority to issue the notices of default at issue in this matter. Additionally, if one or more default remains uncured, the Director has authority, at the minimum, to impose any remedies necessary to prevent or claw back any tax credit benefits, including but not limited to revoking tax credit certificates, notifying the Department of Revenue not to honor such certificates, and refusing to issue additional tax credits.

Given that Ghost Player has not even bothered deny submitting false documents, the Agency's revocation of tax credits was entirely correct and within its clear authority. The only reason it would be beyond the Agency's authority or otherwise forbidden is if Ghost Player has met its burden of showing that some principle of res judicata applies in this particular case to strip away the Agency's ordinary powers.

B. Ghost Player has not Proved the Elements of Res Judicata

Since there is clear authority pursuant to both statute and contract for the Agency to have taken action in this case, Ghost Player's entire argument rests upon its assertion that, notwithstanding such authority, some form of preclusion should prevent Respondent from taking any further action following its February 22, 2012 decision originally granting tax credits to Ghost Player. This argument fails to account for the essential fact that Petitioners' fraud was a newly discovered fact triggering an entirely new agency action unrelated to the previous decision.

There are at least two reasons res judicata does not apply in this case. First, there has been no final adjudicatory decision in this case. Second, Ghost Player's fraud is a new and separate matter that was never at issue in

the agency's prior decision, and which the Agency never had a full and fair opportunity to adjudicate.

i. The Res Judicata Standard

Ghost Player has correctly noted that "Res judicata is a general term that includes both claim preclusion and issue preclusion." (Petitioners' Reply Brief, at 5, App. 977) (citing *Bennett v. MC # 619*, 586 N.W.2d 512, 516 (Iowa 1998)). Yet it has confusingly argued that it is relying on some other "fundamental principle [that] once an administrative agency makes a final agency decision, it lacks any authority to unilaterally attack, modify, or change its decision." (Petitioners' Reply Brief, at 2, App. 974) (citing *City of Des Moines Police Dep't v. Iowa Civil Rights Comm'n*, 343 N.W.2d 836, 839 (Iowa 1984). The Agency remains unclear on what distinction Ghost Player is attempting to make, but it appears to be a distinction without a difference. To the extent there is any such "fundamental principle," it is, as Ghost Player has admitted, because the "final agency action' becomes res judicata, as if it were a final district court judgment, and therefore cannot be collaterally attacked." (Petitioners' Brief, at 7, App. 36) (citing *Bennett*, 586 N.W.2d at 517-18). Accordingly the applicable standard for analyzing whether Ghost Player has met its burden of proving the invalidity of the

agency's actions will be whether they can prove the well-established elements, as applicable, of claim or issue preclusion.

"Res judicata in the sense of claim preclusion means that further litigation on the claim is barred. Res judicata in the sense of issue preclusion means that further litigation on the specific issue is barred." *Iowa Coal Min. Co., Inc., v. Monroe County*, 555 N.W.2d 418, 441 (Iowa 1996). To prove Issue Preclusion, Ghost Player would be required to show all of the following:

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

George v. D.W. Zinser Co., 762 N.W.2d 865 (Iowa 2009) (citation omitted). Ghost Player appears to have conceded they cannot meet this burden, and the court below appears to have based its analysis entirely on claim preclusion. (Petitioners' Reply Brief, at 5-6, App. 977-978, Ruling, at 9, App. 989).

The Iowa Supreme Court has set forth the elements of Claim Preclusion:

> To establish claim preclusion a party must show: (1) the parties in the first and second action are the same parties or parties in privity, (2) there was a final judgment on the merits in the first

> action, and (3) the claim in the second suit could have been fully and fairly adjudicated in the prior case (i.e., both suits involve the same cause of action).

Pavone Kirke, 807 N.W.2d 828, 836 (Iowa 2011) (citations omitted). "The absence of any one of these elements is fatal . . ." *Arnevik v. University of Minnesota Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002). In the context of an agency decision, the second element requires a showing that the decision was a "final adjudicatory decision," meaning both that it was a final decision and that the decision was quasi-judicial in nature. *Bennett v. MC No. 619, Inc.*, 586 N.W.2d 512, 517-18 (Iowa 1998).

ii. There is no final adjudicatory decision with respect to the previous action

Ghost Player has failed to meet its burden of showing that the previous decision was a final adjudicatory decision. As the record makes clear, the initial tax credit determination at issue was neither adjudicatory nor final.

The Iowa Supreme Court has cited with favor the Restatement of Judgments standard for determining whether a ruling is adjudicative, namely:

> (a) Adequate notice to persons who are to be bound by the adjudication.
> (b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair

> opportunity to rebut evidence and argument by opposing parties.
> (c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
> (d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
> (e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

Bennett, 586 N.W.2d at 517 (citing the Restatement (Second) of Judgments, § 83 (2)). The rationale, which the court has adopted, is:

> [w]here an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments. Correlatively, the social importance of stability in the results of such decisions corresponds to the importance of stability in judicial judgments. The rules of res judicata thus generally have application not only by courts with respect to administrative adjudications but also by agencies with respect to their own adjudications.

Id.

Finding that the Agency's decision was an adjudicative decision as against the agency is problematic on multiple levels. Chiefly, the Agency

was not a party when it received the tax credit application.[8] The Agency was functioning as the quasi-judge. Thus this would be equivalent to a party arguing that a decision of a judge was res judicata *against the judge* in a future proceeding in which the judge was a party. There is nothing in the record to indicate that the Agency had notice their own decision would be forever binding against themselves, or that they were considered a party with a right or expectation to present evidence or arguments *to themselves*. They were the decision maker. At no point did they present, nor would a quasi-judicial decision-maker be expected to present, arguments and evidence. An agency reviewing some documents and issuing a tax credit decision, without hearing arguments from more than one adversarial party, is not "a procedure substantially similar to those employed by courts." *Id.*

As for finality, both as an element of the adjudicative analysis, and as a separate requirement for res judicata, there is simply no evidence that the initial tax credit determination was intended to foreclose the issue for all time. Indeed the judicial review provisions of Iowa Code § 17A guaranty that the decision of the agency is not legally final unless a party chooses not to appeal. Petitioners conflate the concept of final agency action with the

[8] Accordingly it is questionable Ghost Player has even met the burden of showing that the parties to the original proceeding (if a tax application can be called a proceeding) and the current one are the same parties. *Kirke*, 807 N.W.2d at 836.

concept of final adjudicatory decision. These are separate concepts. Final agency action means merely that there are no further appeals to the agency and is tied to the administrative law concept requiring exhaustion of administrative remedies as a prerequisite to appealing a decision to the courts. *IES Utilities Inc. v. Iowa Dep't of Revenue and Finance*, 545 N.W.2d 536, 538-539 (Iowa 1996). The "district court sits as an appellate court in judicial review of a final agency action." *Id.* at 539. Thus while the "final agency action" is final in the sense that there is no further administrative appeal, it is by definition not a final adjudicatory decision because it can be appealed to the district court. It makes sense not to treat an agency decision as a final adjudicatory decision where res judicata may lie against the agency until after appeal to the district court because it is only in district court where the agency, *for the first time*, has the opportunity to present its own case in a proceeding where it is a party.

A careful read of authority previously cited by the petitioner in their judicial review brief recognizes this distinction. In the *Des Moines Police* case the Court held that an Order of the Iowa Civil Rights Commission "became final" when the petition for judicial review was dismissed. *City of Des Moines Police Dep't v. Iowa Civil Rights Comm'n*, 343 N.W.2d 836, 839 (Iowa 1984). It was only then, after it had been appealed and was

dismissed in an adjudicative proceeding in which the agency was a party, that it became a final adjudicatory decision entitled to res judicata. *Id.* By filing the previous action for judicial review seeking additional tax credits beyond what the Agency permitted in its prior decision, Ghost Player itself clearly recognized that the "final agency action" at issue in that appeal was not a final adjudicatory decision entitled to res judicata effect. If it were then the Agency would have been entitled to claim res judicata as a basis to dismiss Ghost Player's other petition for judicial review. The prior review has been stayed since revoking all credits due to fraud moots the question of whether additional credits should have been issued for in-kind contributions, but that does not change the fact that there has been no final adjudicatory decision settling once-and-for-all the amount of tax credits that Ghost Player is entitled to.

Respectfully, this Court should reject the partial finality rule adopted by the district court. The district court bifurcates the tax credit determination into two components, the decision "to award tax credits in the abstract" from "whether the initial award should be increased upward. . ." and concludes that the former part of the decision is final and the latter part is not. (Ruling, at 7, App. 987). Thus, evidently, a party aggrieved with an agency decision can selectively lock-in the portions of the decision it likes

while seeking review for the portions of the decision it does not like. This is problematic for reasons both equitable and pragmatic. On the equitable side, the agency is afforded no such right to selectively finalize only a portion of its decision. The agency has no reason to appeal its own decision and no notice of the issues that may be raised by the disappointed party on appeal until it is served with a petition for judicial review. Thus it violates the first element of final adjudication, "[a]dequate notice to persons who are to be bound by the adjudication...." *Bennett*, 586 N.W.2d at 517 (citing the Restatement (Second) of Judgments, § 83 (2)).

On the practical side it ignores what happens if Ghost Player prevails in the other judicial review. Because in-kind contributions were previously and categorically disallowed, no one—not the agency or the court—has ever made a determination as to the value of those claims. Thus if Ghost Player succeeds in obtaining an order that "in-kind" agreements are qualified expenditures as a matter of law, then someone—presumably the Agency—will have to determine the value to assign to such in-kind contributions. This will necessarily include an analysis, as a matter of fact, of whether such in-kind agreements were actually entered into and the value (if any) of the services provided. Thus, it's not really possible to surgically separate the abstract decision to award the credits from the underlying facts on which

that decision was made. Here, Ghost Player is attempting to force the Agency to consider new facts and then turning around and claiming finality when the new facts reveal that Ghost Player committed fraud. The Court should not allow a one-sided finality rule. Either the claims and defenses at issue have been previously and finally adjudicated, or they have not. They have not, and res judicata does not apply.

iii. The fact and consequences of Ghost Player's misrepresentations are a new claim / defense that could not have been fully and fairly adjudicated when the agency made its initial tax credit determination.

Even if Ghost Player had met its burden of proving that the tax credit determination is a final adjudicatory decision, res judicata still does not apply since Ghost Player's misrepresentations are a new claim / defense that has not and could not previously have been determined or adjudicated in any forum. It appears that there is no real dispute that the issue of Ghost Player's misrepresentations never came up when the credits were issued, such that issue preclusion cannot apply. *See Polk County Secondary Roads v. Iowa Civil Rights Comm'n*, 468 N.W.2d 811, 817 (Iowa 1991) ("While it is true that a final adjudicatory decision of an administrative agency is entitled to res judicata effect as if it were a judgment in a court, it is also true that for issue preclusion or res judicata to apply, the issue litigated must be

identical to the issue raised in the previous action). Thus Ghost Player is apparently relying on the notion that the consequences of its misrepresentations are a claim / defense that *could have* been fully and fairly adjudicated when the tax credits were originally issued. *See Pavone Kirke*, 807 N.W.2d 828, 836 (Iowa 2011) (noting the res judicata standard). While it is true in a philosophical sense that it was possible for IDED to have investigated, uncovered, and raised the matter of Ghost Player's fraudulent misrepresentations at an earlier juncture, it did not have a full and fair opportunity to adjudicate the issue until after it was put on notice that the authenticity of the alleged like kind agreements was relevant. *See Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 398 (Iowa 1998) (claim preclusion bars matters actually determined and all *relevant* matters that could have been determined).

The agency record shows the Respondent did not award tax credits for, inter alia, "in-kind" contributions, because such arrangements were not "payments" and therefore not qualified expenditures under Iowa Code § 15.393(2)(a)(2). (R. at 1303, 1331, App. 845, 851). The legal determination of whether certain types of claims meet the statutory definitions of "payments" under the film credit statute is very different than the factual determination of whether Petitioners have submitted false statements in

writing in order to obtain economic development assistance from the State. The mere fact that the latter determination moots the former, because such acts of fraud constitute independent grounds to refuse to issue any tax credits and to revoke issued tax credits and seek repayment of any tax credits used to discharge Iowa tax liability, does not somehow convert a new claim into a claim that could have been fully and fairly adjudicated when the credits were issued.

It is fundamentally unfair to impose on the Agency the burden of investigate facts that were not relevant at the time the original decision was issued. It bears repeating that the authenticity or value of Ghost Player's alleged like kind agreements did not matter so long as like kind contributions were disallowed categorically as a matter of law. It is only if the district court in the currently stayed judicial review hearing, CVCV 50209, concludes that like kind contributions are allowed that their amount and authenticity becomes relevant.[9] It was entirely reasonable for the Agency not to investigate irrelevant facts when it was making the tax credit determination. The opposite

[9] Indeed, it would have been perfectly reasonable for the Agency to have waited until after the court rendered a decision in that case to begin the work of authenticating and valuing these agreements. The IEDA was in fact being proactive and responsible by trying to determine the underlying facts while the prior judicial review was still pending.

result would unfairly require agencies to investigate not only facts that are relevant, but any facts that *might become relevant* if some future court interprets the law differently than the agency. That is absurd. It cannot be said that an agency has had a full and fair opportunity to adjudicate claims / defenses emerging from facts that were not relevant at the time of the original claim.

All that said, upon actually discovering new facts, the Agency has every right to raise and adjudicate its contractual rights arising from those facts. This is, properly considered, an entirely new claim or defense arising of new factual information that the agency did not have a full and fair opportunity to discover and raise previously. The IEDA has concluded that Ghost Player submitted fraudulent and fabricated documents. It has taken the new action of revoking tax credits as a remedy for Ghost Player's breach of contract. This is not seeking a second bite at the apple with regards to a matter previously decided, the valuation of tax credits where the state had no reason to suspect fraud. This is seeking a first bite of the apple on the state's contractual right to revoke tax credits issued to a party caught red-handed lying on a tax credit application. The IEDA has never

previously had a full and fair opportunity to adjudicate that issue. Res judicata is not appropriate in this case.

C. Even if the elements of Res Judicata were met, this case falls under the scheme of remedies exception.

The Iowa Supreme Court has recognized that res judicata principles have exceptions. *Pinkerton v. Jeld-Wen, Inc.*, 588 N.W.2d 679, 681 (Iowa 1998). One such exception is the scheme-of-remedies exception. *Id.* "An adjudicative determination of a claim by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction *if the scheme of remedies permits assertion of the second claim notwithstanding adjudication of the first claim." Id.* (emphasis in the original). The prior "claim" was IEDA's power to determine whether the expenditures asserted were qualified expenditures pursuant to Iowa Code § 15.393(2). The current "claim" is IEDA's power pursuant to contract to declare an event of default based upon misrepresentations by Ghost Player and impose contractual remedies for that default. Since the statutory and regulatory regime clearly permit *both* the initial determination of qualified expenditure and the subsequent declaration of a breach of contract, the IEDA's second

action is permitted under the scheme of remedies governing the relationship between the parties.

The statutory scheme contemplated that the IDED must verify eligibility for the tax credit, including whether or not the claimed expenditures are qualified expenditures. Iowa Code § 15.393(3). Also consistent with the statutory scheme, as this Court previously recognized, the IDED promulgated a rule and entered into a contract with terms required by rule, including terms for "'penalties imposed in the event the [film producers failed to] fulfill its obligations' under the contract." *Ghost Player, L.L.C. and CH Investors, L.L.C. v. State of Iowa*, 860 N.W.2d 323 (Iowa 2015) (citing Iowa Admin. Code 261-36.5(2) (2008)).

If res judicata applies, absent a scheme of remedies exception, the contract entered into by the parties pursuant to rule and consistent with statute would be a virtual nullity. The Agency would be powerless to declare any event of default after the initial tax credit determination. Indeed applying res judicata in this context would require the Court to ignore the parties expressed contractual intent to create a scheme of remedies. It would require the court to either read the entire default and remedies sections out of the contract or, worse yet, re-write those sections to include an unstated time

limit prohibiting the declaration of any additional events of default after tax credits are first issued. There is no evidence in the record this is what the parties intended, and it is contrary to the plain meaning of the contract. (*See* Contract, passim., App. 40-52). Accordingly the court should decline to torture the contractual language to insert a wholly uncontemplated cutoff date for declaring events of default. *See NevadaCare, Inc. v. Department of Human Services*, 783 N.W.2d 459, 466 (Iowa 2010) (noting "the intent of the parties at the time they entered into the contract is the cardinal rule of contract interpretation").

The court should not permit Ghost Player to avoid the consequences of its bargain. The scheme of remedies provided by law, and agreed to by the parties, contemplated that Ghost Player could face consequences if it breached its contract irrespective of when that breach of contract was discovered. There is no reason in equity or law why the Agency should not be able to enforce the terms of a contract that no one has denied is still to this day in effect between the parties. Since the scheme of remedies contemplated the assertion of breaches of contract in addition to and subsequent to the original tax credit determination, Res judicata does not apply.

CONCLUSION

The Agency's actions were not beyond its authority and are not prohibited by law. The Agency has the clear contractual right to revoke tax credits upon discovery that a recipient made materially false statements in their application. Res judicata does not apply since there has been neither a final adjudicatory decision nor a full and fair opportunity for the Agency to have previously adjudicated the misrepresentation claim. In addition, the Agency's action fall squarely within the scheme of remedies permitted by the law and agreed to by Ghost Player. For these and all of the foregoing reasons, the decision of the district court should be reversed, and the decision of the Agency affirmed.

REQUEST FOR ORAL ARGUMENT

Appellant, Iowa Department of Economic Development, requests that it be heard at the time of final submission of this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the type face requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font size and contains 8,525 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ David L.D. Faith, II
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CERTIFICATE OF SERVICE

I, David L.D. Faith, II, hereby certify that on the 7th day of August, 2017, I or a person acting on my behalf did serve Appellant Iowa Department of Economic Development's Final Brief and Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, David L.D. Faith, II, hereby certify that on the 7th day of August, 2017, I or a person acting on my behalf filed Appellant Iowa Department of Economic Development's Final Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

/s/ David L.D. Faith, II
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